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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1017

WILLIAM G. PETUSKEY, ROBERT A. BULLOUGH, CLINTON, M. BLACK, FARROL R. LAMBERT, and BRIAN FLORENCE,

Petitioners,

v.

CALVIN L. RAMPTON, as Governor of the State of Utah, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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December 30, 1970

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RESPONDENTS' BRIEF IN OPPOSITION

1. The three-judge court which retained jurisdiction properly denied the motion to intervene.

It was proper for the three-judge court which retained jurisdiction only to grant supplementary relief to deny an application for permissive intervention made more than four years after the challenged action was taken by the legislature and which action preceded the decision of the three-judge court which retained jurisdiction.

Petitioners do not contend that the three-judge court decision upheld in the Court of Appeals was in error as to the procedural question it decided (whether a permissive

joinder should be allowed to seek a different relief from that granted nearly four years before when jurisdiction was retained only to assure compliance with the order entered). No claim is made that the intervention sought was other than permissive nor that the lower court abused its discretion in denying that intervention. They only claim that that question was one that must be determined only by a single judge.

Where a three-judge court has been convened under 28 U. S. C. Section 2281 and 2284, its jurisdiction continues until a final determination is reached regardless of any intermediate steps that may have been taken along the way. Where jurisdiction has been retained, and a final determination is still pending, this three-judge court is still in existence and still considered as convened to consider the issues before it. *Stout* v. *Hendricks*, 235 F. Supp. 556 (1964). That case was very similar to this one. There a three-judge court in the District Court of Indiana declared certain legislative apportionment unconstitutional and retained jurisdiction. When at a later date the plaintiffs sought certain relief from one of the judges involved and obtained it from him, the other two judges overruled his actions, holding that the three-judge court still was in existence and had jurisdiction.

Once a three-judge court has been properly convened under these particular sections of the United States Code, it is to decide all substantial issues pertaining to that case. This is so even as to issues which if standing alone would not merit a three-judge court. While the three-judge court may assign certain aspects of any case to one of its members, the whole court must consider any substantial issues. *Healey* v. *Murnaglean*, 34 F. Supp. 203 (1939); *Hadnott* v. *Ames*, 295 F. Supp. 1003 (1968); *Wolfe* v. *Boyde*, 287 F. 2d 520 (1961). This is in line with the policy behind said Sections 2281 and 2284,

that of protecting states' rights and sovereignty by providing for consideration by a three man panel of judges rather than one single judge. *Phillips* v. *United States*, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed 800 (1940); *Swift & Co.* v. *Wickham*, 382 U. S. 11, 82 S. Ct. 258, 16 L. Ed. 2d 194 (1965); *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U. S. 10, 51 S. Ct. 8, 7 L. Ed. 135 (1930); *Ex Parte Collins*, 277 U. S. 565, 48 S. Ct. 585, 72 L. Ed. 990 (1928); *Bartlett* v. *Kansas*, 223 F. Supp. 975 (1963); *Eastern Freightways, Inc.* v. *United States*, 170 F. Supp. 848 (1959).

That the issues which have been presented to this court by said Motion for Intervention are anything less than very substantial can hardly be argued. These issues are such that their resolution may very well determine whether a constitutional convention is called in the United States. If it is called, it will be the first since 1789.

2. The legislative action sought to be rendered ineffective is a "statute" within the meaning of § 2281, 28 U. S. C., so that it required a three-judge court determination.

In the case of *American Federation of Labor* v. *Watson*, 327 U. S. 582, the court said:

> that "statute," as used in a predecessor of § 2281, "is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction."

This was the basis of the decision of the Court of Appeals. It is significant that the petition to review that decision entirely ignores that case and the principle just quoted. On the other hand, the decision of the Court of Appeals considered and distinguished the case of *Public Service Commission of Missouri* v. *Brashear Freight Lines*, 312 U. S. 621 (1941), on

which petitioners primarily rely in this point. The same is true with respect to the case of *Rosado* v. *Wyman*, 397 U. S. 397 (1970).

In *Sigma Chi Fraternity* v. *The Regents of the University of Colorado*,, 258 F. Supp. 515 (1966) a resolution of the Board of Regents was held adequate to be considered a statute under this section; and in *Goldman* v. *Olson*, 286 F. Supp. 35 (1968) a resolution of a single house of a legislature, the Senate of the State of Wisconsin, creating an investigation committee was held to be such statute. It would seem, therefore, that Senate Joint Resolution No. 3, would very assuredly fall within the limits of what is a "statute" under Section 2281.

3. The matter in question is res judicata.

Petitioner Florence was a member of the class for which the main action was brought and all members of the class are bound by the adjudication of the three-judge court decision of July 3, 1965 (243 F. Supp. 365), which recognized the prior passage of the subject resolution and did not invalidate it in granting partial relief to petitioners based on their second supplemental complaint filed May 17, 1965. In that decision the court, in Footnote No. 10, said:

> It is interesting to note the speed by which the last State Legislature memoralized Congress (S. J. R. No. 3) to call a constitutional convention to provide for reapportionment "on factors other than population", which resolutions the State Senate passed on the tenth day of the session, compared to the Legislature's hesitancy to properly reapportion under the mandate of this court, which action occurred on the final (sixtieth) day of the session.

In that opinion the court also said:

> Nothing we do today is to be interpreted as authorizing the Legislature at any session prior to January 1967 to pass any further reapportionment legislation except to stagger the terms of the senators in accordance with the State Constitution of Utah. And particularly, nothing we do today is to be interpreted as authorizing legislative action with respect to any amendment which may be proposed to the Constitution of the United States to permit apportionment including factors other than population.
>
> Should the Legislature, between now and January 1, 1967, attempt to reapportion unconstitutionally or attempt to ratify any proposed amendment to the Constitution of the United States to apportion one or both houses of the Legislature on factors other than population, it will be this court's duty to give further consideration to the necessity of giving plaintiffs injunctive and affirmative relief by judicial decree, and for such purpose we again retain jurisdiction.

4. If the substantive issue is not res judicata on the last grounds set forth above, the proper procedure to determine the substantive issue involved is an independent action.

The relief sought is entirely separate from the reapportionment sought by and resulting from the main action. The fact that the 1965 Legislature was malapportioned at the time of its action in question has been established as a matter of law, and there is no need or benefit to join the cause in intervention with the malapportionment case which came to rest some four years before when no supplementary relief became necessary and the three-judge court retained jurisdiction solely to provide such supplementary relief if needed. As Judge A. Sherman Christensen wrote in a separate opinion filed August 18, 1969, in support of the per curiam decision of the three-judge court:

"A three-judge court on an assignment to one judge of a case which has been fully adjudicated can not relegate to that judge or that court the consideration of all matters relating to the general subject in perpetuam."

Respectfully submitted,

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Deputy Attorney General
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Assistant Attorney General

Attorneys for the Respondents

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PETITIONERS' REPLY BRIEF AND SUPPLEMENTAL BRIEF

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ARGUMENT

1. The three-judge court improperly denied the motion to intervene.

Despite the assertions of respondents' brief in opposition, petitioners have always contested the three-judge court's denial of

their motions to intervene and to file a supplemental complaint. Respondents have, until now, always conceded that intervention was proper. Thus, in their brief filed on July 7, 1969, (Record, pages 36-42) respondents supported intervention by the filing of a memorandum entitled "Memorandum In Support Of Applicant For Intervention Being Permitted To Intervene" which argued, in part:

> In the Action into which the applicant for intervention here proposes to intervene, there would be no undue delay occasioned by such intervention. This is due to the fact that one phase concluded, more or less, on July 3, 1965, with jurisdiction retained, a situation that can probably best be described as a pause in the proceedings, and the intervention proposed would not prevent the rendering of a further judgment or decision that is eminently forthcoming.
>
> * * *
>
> Since both the Defendants and the Applicant for Intervention in this case urge that the latter be allowed to intervene, there could be no challenge from either of these parties if the intervention was granted. No disadvantage would accrue to the Court in this regard, it is submitted, by allowing said Applicant to so intervene.

No party to this action has ever asserted any claim of prejudice or other injury or disadvantage which would result from granting the motions to intervene and to file a supplemental complaint. Under these circumstances, petitioners contend that it was error for the three-judge court to deny intervention and to disregard the motion to file a supplemental complaint.

Petitioners further contend that jurisdiction, in any event, properly resided in the single district judge who granted the above motions. That jurisdictional contention is intimately related to the above motions, for these motions were properly addressed to the discretion of the single judge who sits alone to exercise the jurisdiction of the district court under the provisions of 28 U.S.C. § 132(c):

> (c) Except as otherwise provided by law, or rule or order of court, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.